89- 1537

FILED
MAR 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DENNIS J. SOLOMON
Petitioner Pro Se,

vs.

WILLIAM HILL, WYNN UNDERWOOD, LOUIS PECK,
ALBERT BARNEY, ROBERT LARROW,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Second Circuit.

Dennis J. Solomon
P.O. Box 289
Yarmouth, MA 02675
508-394-1737

March 15, 1990

QUESTIONS PRESENTED

1. Does a U.S. District Court have jurisdiction to render a valid judgement in a "collateral attack" and civil rights action alleging "want of all juri liction" by a state court of last resort ?

2. Does a forum state lack subject matter jurisdiction over non-residents for acts of speech and press in the District of Columbia where no act or injury occurred in the forum state?

3. Where any appearance of in personam jurisdiction of a state court over a non-resident was procured by fraud and collusion by plaintiff's and defendants' counsel and a ex-Justice, upon a state court, does the U.S. District Court have jurisdiction to vacate a subsequent decision?

4. May a state Court may exercise general jurisdiction over a non-resident solely on the basis that the party joined as plaintiff a stockholders' derivative action brought in the forum state?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Dennis J. Solomon and the respondents William Hill, Wynn Underwood, Louis Peck, Albert Barney, Robert Larrow.

The parties to the original action were Patrick Malloy, defendant & counter-claimant and Dennis J. Solomon, plaintiff.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... 2
LIST OF PARTIES..... 4
OPINIONS BELOW..... 10
JURISDICTION..... 10
STATUTES INVOLVED..... 11
STATEMENT OF THE CASE..... 12
REASONS FOR GRANTING THE WRIT..... 21

I. A Major Conflict Between The Circuits Has Been Created By The Second Circuit's Sanction Of The U.S. District Court Abdication Of Jurisdiction To Render A Valid Judgement In A "Collateral Attack" And Civil Rights Action Alleging "Want Of All Jurisdiction" By A State Court Of Last Resort which this Court should resolve..... 21

II. The Appearance of Jurisdiction of the Courts Below was Procured by Fraud upon the Court and Adequate Relief cannot be had from any other Court..... 27

III. The Extent Of Jurisdiction Of A State Court Over A Non-Resident Stockholder Plaintiff To A Stockholders' Derivative Action Is An Unsettled Matter Of Considerable Importance..... 29

A. *Shaffer v. Heitner* And *Burnham v. California Superior Court* Do Not Embrace The Issue

B. Vermont's Position Rejects The Sovereignty Of Other States

C. Vermont's Position Conflicts With This Court, Other Circuits And The U.S. Constitution

VI. The Second Circuit's sanction of subject matter jurisdiction by a State over a non-resident's acts in the District of Columbia based on the general and appellate jurisdiction of the State courts is in conflict with other States, Circuits and this Court, and represents an pressing unsettled issue..... 35

V. The Decision Below Abridges The Constitutional Right To Speak Truthfully On Matters Of Public Interest And To The Press And Adequate Relief Cannot Be Had From Any Other Court..... 40

IV. There Is A Total Absence Of Evidence In Support Of The Judgement And Adequate Relief Cannot Be Had From Any Other Court..... 45

CONCLUSION..... 46
APPENDIX..... 47

TABLE OF AUTHORITIES

Cases: Page

Aguirre v. Aja, 30 A.2d 89 (1943)..... 23, 24

Asahi Metal Industry Co., Ltd. v. Superior Court of California, 480 U.S. 102 (1987)... *34*

Bartels v. International Commodities Corp., 435 F.Supp. 865 (1977)..... 23

Burger King Corp v. Rudzewicz, 471 U.S. 462 (1985)..... 34

Burlington Data v. Automated Medical Systems, Inc., 492 F.Supp. 821 (1980)..... 26

Cervantes v. Time, Inc., 464 F.2d 986, cert. denied 93 S.Ct. 939 (1972)..... 41

Curtis Publishing Company v. Col. Birdsong, 360 F.2d 344 (1966)..... 31, 34

Erlanger Mills v. Cohoes Fibre Mills, 4. Cir. 1956, 239 F.2d. 502, 509..... 34

Fitzpatrick v. Bitzer, 96 S.Ct. 2666(1976). 18

Gertz v. Robert Welch, Inc., 94 S.Ct. 2997 (1974)..... 25

Hunt v. Liberty Lobby, Inc., 228 U.S.App.D.C. 88..... 23

Kulko v. Superior Court of California, Etc., 98 S.Ct. 1690 (1978)..... 24

Lafko v. Lafko, 256 A.2d 168 (1966)..... 23

Margoles v. Johns, 483 F.2d,1212(1973).. 30,34

New York Times v. Sullivan, 84 S.Ct. 710 (1963)..... 41, 46

Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d. 871 64 S.Ct. 1057(1944)... 23

Palmore v. U.S., 93 S.Ct. 1670 (1973)..... 25

Pennoyer v. Neff, 24 L.Ed. 565 (1878)..... 24

Nilliken v. Meyer, 61 S.Ct. 339,342 (1940). 31

Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 1558 (1986)..... 38

Rosenblatt v. Baer, 86 S.Ct. 669 (1966).... 42

Shaffer v. Heitner, 97 S.Ct. 2569 (1976)... 29

Town of Springfield, Vt. v. McCarren, 722 F.2d. 728, certiorari denied 104 S.Ct. 360 (1982)..... 26

World-Wide Volkswagon Corp. v. Woodson, 100 S.Ct. 559 (1980)..... 32

IN THE SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 1990

DENNIS J. SOLOMON
Petitioner,

vs.

WILLIAM HILL, WYNN UNDERWOOD, LOUIS PECK, ALBERT BARNEY, ROBERT LARROW,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Dennis J. Solomon, respectfully requests that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Second Circuit entered December 22, 1989 and the judgement of the Vermont Supreme Court entered February 14, 1986.

OPINIONS BELOW

The opinions of the Court of Appeals, the U.S. District Court, the Vermont Supreme Court and Superior Court are incorporated in the Appendix.

JURISDICTION

The judgement of the Court of Appeals was entered on December 22, 1989. The judgement of the Vermont Supreme Court entered February 14, 1986. This Court has jurisdiction under 28 U.S.C.A. 1254(1), 1257(3) and 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S Constitution

Article 1, Section 8, clause 17 35

First Amendment 40

Fourteenth Amendment 27,31,33

Title 42 U.S.C.A. § 1983 .....25, 39

Title 28 U.S.C.A. § 1343(a) 22, 24

STATEMENT OF THE CASE

In November of 1975, the petitioner, one Dennis J. Solomon, 25 year-old, Massachusetts Institute of Technology-trained scientist with an active interest in sailing, and a founder and a minority stockholder of Atlantis Development, Inc., a marine equipment company, received at his residence in Massachusetts a notice of a stockholders' meeting to "elect new officers" of Atlantis Development, Inc., a Massachusetts corporation doing business in Vermont, where the meeting was to be held.

On or about January 19, 1976, the petitioner drove to Vermont to attend the meeting. At the meeting on Monday, January 19, 1976, one Patrick E. Malloy, the vice-resident of finance, and one Mark Mordecai, president, presented an altered financial statement from the one prepared by one Timothy Davis, the Harvard Business School manager.

Malloy and Mordecai asserted the statement was prepared the immediate Sunday night before and showed unexpected and substantial losses while the company was expanding sales at an annual rate of 400%. Malloy demanded immediate action and Mordecai proposed that Malloy buy the company for $1.00 to "bail it out." Solomon refused to participate and demanded hiatus of 10 days to review the books. Malloy threatened to bankrupt the company unless the assets were sold to him for $1.00. Malloy and Mordecai voted for the sale and after asking for 24 hours which was refused so did Meledones, thus constituting 75% of the voting stock. Petitioner voted against the sale of assets. A successor corporation was incorporated three days later in Delaware with the same president and staff. Petitioner returned to Massachusetts a few days later.

Patrick E. Malloy was a commodities and real estate speculator with little sailing experience who had recently purchased a failing boat yard in Sag Harbor, New York. Malloy had worked a E.F. Hutton with a speculator named Stephen Sundheimer. Malloy also was friendly with one Stephen Green, the potato futures specialist at E.F. Hutton. In April or May of 1975, while negotiating his participation in Atlantis, Malloy invited petitioner and other principals of Atlantis sailing with himself and Green, who had just returned from Idaho on a trip related to potato futures. The subjects of commodities trading and potato futures were discussed. References were made to the major Idaho "farmer" and the price moving substantially up and then down in the next year. The petitioner was unfamiliar with futures trading at the time.

On or about May of 1976, the petitioner, while in Washington, D.C., read an article in the Washington Post describing the "Great Potato Futures Default" of 1976. The article contained references and descriptions of events and personalities similar to those described by Malloy a year earlier.

Petitioner, while in Washington, D.C. called the reporter and asked for the name of the parties involved in the default. The reporter, a Dan Morgan, asked why the petitioner was interested. The petitioner responded by describing the conversation of the previous sailing trip including its date. Petitioner also described the article and conversation to attorney Kimberly Cheney.

During the year of 1976, one Dean Meledones, the former treasurer of Atlantis Development, Inc., discovered serious accounting errors, an inexplicable shrinkage

of inventory, and other misrepresentations of financial documents, in the information provided to the stockholders of Atlantis Development, Inc. These inconsistencies were confirmed by Professor Michael van Breda, an expert witness who was on the faculty of the Sloan School of Management at the Massachusetts Institute of Technology. A majority of the former stockholders were domiciled and the corporate offices and inventory remained in the State of Vermont.

In December of 1976, petitioner joined a minority stockholders' derivative action represented by Attorney Kimberly Cheney of Vermont against Atlantis Development, Inc. Attorney Cheney knew petitioner was a resident of Massachusetts and addressed all correspondence there.

In January of 1976, Malloy, owner of the assets of Atlantis Development, Inc., filed a

counter-claim against petitioner alleging that, as a result of petitioner's call to the Washington Post, brokers on the floor of the Exchange "snickered" at him.

Attorney Cheney agreed to represent the stockholders on a contingency basis but required a retainer and other payments from the petitioner for representation on the counter-claim.

Malloy, his counsel, R. Rachlin and R. Mello, and Kimberly Cheney had personal knowledge and knew the petitioner was a resident of Massachusetts.

Attorney Cheney filed a motion to dismiss and sever the counter-claim of slander.

On April 12, 1977, petitioner visited Vermont for the purpose of delivering evidence to Cheney. Later that afternoon, Cheney told petitioner that the Vermont Superior Court Judge wanted to see the

petitioner. With a uncharacteristic absence of defense counsel, and the unusual presence of the plaintiff-petitioner, the Judge ruled on the motion to sever and dismiss.

The Trial Court, Judge Ernest Gibson, now of the Vermont Supreme Court presiding, found in 1981, that the sale of assets "displayed itself as badge of fraud" and found for the petitioner on the original action. On the counter-claim the Court found that petitioner "had insufficient evidence to call a newspaper reporter". There were no Findings of Fact supporting personal or subject matter jurisdiction.

There were no Findings of Fact supporting any statements of false or misleading facts by petitioner.

There were no Findings of Fact supporting any connection or route between the private conversation of petitioner and Morgan and the

"credible evidence" of brokers on the floor of the exchange "snickering." Nonetheless, the Court found for Malloy in the amount of $2,500 for compensatory and $2,500 for punitive damages. The Trial Court found that Malloy was trading May potato futures through Pressner Trading Company and knew Stephen Sundheimer, parties named by the Government as participants in the futures default.

Petitioner, on the advice of counsel Cheney, appealed to the Vermont Supreme Court. During the appeal, counsel, citing conflict of interest, resigned. Petitioner was unable to afford legal representation due to the existence of a continuing contingency agreement with the previous firm.

Petitioner argued pro se before the Vermont Supreme Court. Prior to the argument, Cheney said knowingly to petitioner, "You will find that Justice Hill is particularly

interested." After a few minutes in oral argument as petitioner began raising the issue of jurisdiction, the Justice abruptly ended oral arguments.

In late 1986, the Vermont Supreme Court, Justice Hill writing the opinion, affirmed the judgement of slander. Less than a month thereafter, Judge Hill, Hayes and Gibson were involved in a proceeding for judicial misconduct unrelated to this case. Petitioner moved for reconsideration and the motion was denied by Justice Peck without comment in 1988.

Ex-Justice Hill was convicted of judicial misconduct on September 19, 1989.

REASONS FOR GRANTING THE WRIT

I. JUDICIAL IMMUNITY HAS NEVER BEEN CONSIDERED ABSOLUTE AND THE TRADITIONAL TEST HAS BEEN A "WANT OF ALL JURISDICTION." THE UNITED STATES DISTRICT COURT IS AN APPROPRIATE FACT FINDING FORUM FOR A COLLATERAL ATTACK ON THE JUDGEMENT AND AN ACTION FOR OTHER RELIEF.

The present case represents the uncommon occurrence where a state court compels a non-resident to defend constitutionally permissible activities in which the state has no legitimate interest, in order to protect his unrelated equity rights in an out-of-state corporation doing business in the forum state. Underlying the decision are unique factors of judicial turmoil and misconduct in the Vermont Supreme Court. The complaint alleges a "want of all jurisdiction." The averments point out that the alleged act of slander occurred in Washington, D.C., the alleged injury occurred in New York and the parties were non-residents of Vermont during the entire period. These facts are

uncontroverted and no more complete "want of all jurisdiction" could be imagined.

The opinion of the Second Circuit is in conflict with this Court and the other Circuits and suggests that there is no Federal fact-finding forum for a collateral attack on a state judgement against a non-resident or repugnant to the U.S. Constitution. This approach diminishes the "right to petition" and Title 28 U.S.C.A. § 1343(a). It creates difficult and unnecessary burdens to overcome this form of injustice. A more utilitarian protocol would compel Answers To The Complaint and if warranted dismiss the action by a summary judgement on the merits.

It is well-established that any judgement by a court which has not acquired jurisdiction is subject to vacation or collateral attack. *Hunt v. Liberty Lobby, Inc.* 228 U.S.App.D.C. 88. In *Bartels v. International Commodities*

Corp., 435 F.Supp. 865, the Court stated on P. 867:

"If a court has never acquired jurisdiction over a defendant or the subject matter, failure to abide by time limits is of no consequence whatever, since any judgement ultimately entered is void and subject to vacation or collateral attack."

See also *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F.2d. 871 64 S.Ct. 1057 (1944). This action is not inconsistent with Law of Vermont. In *Aguirre v. Aja*, 30 A.2d 89 (1943), Justice Sherburne wrote:

> "An objection to jurisdiction over the subject matter is never out of time, and neither waiver nor consent can confer jurisdiction where it is not given by law; and a court will take appropriate action, whether moved by a party or not, when it is discovered."

The Court further stated that:

> "It is not enough to allege jurisdictional facts; they must also be proved."

This position was further restated by the Vermont Supreme Court in *Lafko v. Lafko*, 256 A.2d 168 (1966) as follows:

> "Jurisdiction, to be complete, must be of the person, the process and the subject matter. Perry v. Morse, 57 Vt. 509, 513. The power of the court, as to person and process, may be conferred by waiver and consent. But the power of the court to deal with the subject matter of the controversy can be generated only by force of law. It is unaffected by agreement or conduct of the parties. *Aguirre v. Aja*, 113 Vt. 123, 125, 30 A.2d 88."

This is the Law of Vermont. There is no Findings of Fact by the Trial Court in the original action which establishes or proves jurisdiction over the counter-claim of slander.

Jurisdiction of the U.S. District Court is permitted under the 14th Amendment to the U.S. Constitution and Title 28, Sec. 1343 (a) which reads:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person ... To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States ... To recover damages or to secure equitable relief..."

The present action requests that the judgement of the Vermont Supreme Court be declared void on the grounds of lack of jurisdiction. Clearly, the United States District Court of Vermont has original jurisdiction to the extent not otherwise prohibited and is the appropriate venue.

The present case follows the well-established line of cases on jurisdiction related to *Pennoyer v. Neff*, 24 L.Ed. 565 (1878) and *Nilliken v. Meyer*, 61 S.Ct. 339,342 (1940) and secondly those cases related to the Civil Rights Act of 1964, 42 U.S.C.A. 1983, and 42 U.S.C.A. 1988 -- *Fitzpatrick v. Bitzer*,

96 S.Ct. 2666 (1976) and *Kulko v. Superior Court of California, Etc.*, 98 S.Ct. 1690 (1978). These cases clarify the requirements for a collateral attack on the judgement raising the jurisdictional question. See also *Town of Springfield, Vt. v. McCarren*, 722 F.2d. 728, certiorari denied 104 S.Ct. 360 (1982), *Burlington Data Processing, Inc. v. Automated Medical Systems, Inc.* 492 F.Supp. 821.

The present case does not seek to overturn a judgement of the highest Court of a State on matters adjudicated, but to collaterally attack the jurisdiction of the State Court on which the State Court was silent. Without access to a Federal fact-finding court, a party would have no recourse to redress this issue and determine the facts. The Second Circuit's sanction of the dismissal of these right is in conflict with the long-standing

Constitutional provisions for a "redress of grievances" and "due process."

II. THE APPEARANCE OF JURISDICTION OF THE COURTS BELOW WAS PROCURED BY FRAUD UPON THE COURT AND ADEQUATE RELIEF CANNOT BE HAD FROM ANY OTHER COURT.

Any appearance of jurisdiction was procured by fraud upon the Court, which the Trial Court attempted to avoid by silence on the subject of jurisdiction. Attorney Kimberly Cheney had personal knowledge that petitioner was a resident of Massachusetts at all times during the act of conversation with the Washington Post and subsequent proceedings. From February of 1976, Cheney addressed all correspondence to petitioner at his Massachusetts address. Defendant Malloy, and his counsel, Robert Rachlin and Robert Mello, had knowledge of petitioner's residence during the entire proceedings. In November of 1975, Malloy mailed the Notice of the

Stockholders' Meeting to petitioner in Massachusetts.

On April 12, 1977, petitioner visited Vermont for the purpose of delivering evidence to Cheney. Later that afternoon, Cheney told petitioner that the Vermont Superior Court Judge wanted to see the petitioner. With a uncharacteristic absence of defense counsel and presence of the petitioner, the Judge ruled on the motion to sever the counter-claim. This self-serving behavior on the part of counsel can only be considered fraud upon the Court and abuse of process.

Following the decision of the Trial Court, Cheney advised and on behalf of petitioner, appealed the decision on the counter-claim of slander to the Vermont Supreme Court. In his brief, the question of jurisdiction was not raised.

The petitioner respectfully proffers that jurisdiction over the counter-claim of slander never existed nor was otherwise acquired. The judgement of the Vermont Court should be vacated.

III. THE SECOND CIRCUIT'S SANCTION OF GENERAL PERSONAL JURISDICTION BY A STATE OVER A NON-RESIDENT JOINING AS PLAINTIFF A STOCKHOLDERS' DERIVATIVE ACTION BOUGHT IN STATE VIOLATES THE CONCEPT OF "REASONABLE FORSEEABILITY" AND "SUBSTANTIAL JUSTICE" EXPOUNDED BY THIS COURT IN *SHAFFER V. HEITNER* AND IS NOT RAISED IN *BURNHAM V. CALIFORNIA* SUPERIOR COURT.

The requirement that extra-territorial en personam jurisdiction must be affirmatively established and the result of "reasonable foreseeability" has been both State and Federal Law.

This Court, in *Shaffer v. Heitner*, stated: "[i]t strains reason ... to suggest that anyone buying securities in a corporation formed in Delaware 'impliedly consents' to

subject himself to Delaware's "... jurisdiction on any cause of action."

In *Margoles v. Johns*, 483 F.2d, 1212 (1973), the Court of Appeals for the District of Columbia Circuit stated:

> "Three formulations of the various long-arm statutes currently in force predominate: (1) Statutes which predicate jurisdiction over a non-resident upon either a "tortious act" or "tortious conduct" occurring within the state...(2) Statues which predicate jurisdiction over a non-resident upon the commission of "a tort in whole or in part" within the jurisdiction...(3) Statutes which substantially adopt the Uniform Act (Uniform Interstate and International Procedure Act) and separate "act" from "injury", granting jurisdiction over non-resident who by their out-of-state acts or omissions cause tortious injury with the state only where additional minimum contacts with the state are also present."
>
> The "act," of course, is the act of the alleged tortfeasor--here that act, uttering defamatory statements, occurred in Wisconsin. Nothing can change that fact. The additional facts that other third party act were necessary to consummate the tort, or that the injury itself took place within the District, cannot

> under our reading of the Uniform Act grant jurisdiction that is otherwise lacking. Unless we wish to delve into a magical mystery tour of "projecting presences," we must find that no jurisdiction can be afforded..."

The Court, in *Curtis Publishing Company v. Col. Birdsong*, 360 F.2d 344 (1966), presented three questions, each requiring an affirmative answer. The first addressed legislative intent to include non-resident defendants with minimal contacts. The second and third questions raise the Constitutional issues under the due process clause of the Fourteenth Amendment of whether the activities have been sufficient to establish minimum ties, contacts and relation with the forum State, and as the Court wrote:

> "And the third question is ... whether the State of Alabama had a sufficient interest in the litigation to justify, under the due process clause, the exercise of extra-territorial jurisdiction by a court in Alabama over the nonresident defendant. Since we are

> clear that the answer to this last question is decisive of the issue of jurisdiction ... The Supreme Court has made it perfectly clear that in this type of situation the State which seeks to subject a nonresident to its judicial jurisdiction must have a definite interest in the litigation. This in the leading case of *International Shoe co. v. State of Washington*, 1945, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 ..."

The Court also cited *Erlanger Mills v. Cohoes Fibre Mills*, 4. Cir. 1956, 239 F.2d. 502, 509:

> "If one State may, without violation of the due process clause, extend the authority of its courts beyond its boundaries over persons and institutions not sufficiently related to that State, the separate identity of the States will be reduced to mere fiction. * * * It requires no flight of fancy to foresee the resulting maze of lawsuits adjudicating the interests of persons having only the faintest and most remote links with the State exercising authority."

This Court, in *World-Wide Volkswagon Corp. v. Woodson*, 100 S.Ct. 559 (1980), clearly stated that:

> "* * * the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgement. * * * The Due Process Clause by ensuring the "orderly administration of the laws," International Shoe Co. v. Washington, 326 U.S., at 319, 66 S.Ct., at 159, gives a degree of predictability to the legal system that allows potential defendants to structure the primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."

In the present case, it is the position of the Second Circuit that the Vermont court extend jurisdiction retroactively to include a previous unrelated alleged act based on "benefit of the laws" test of personal jurisdiction invoked by a stockholder's derivative action. By retroactively, the appellant emphasizes the fact that during the period when the alleged act and injury of slander occurred - May of 1976 - the appellant had no minimal contacts of any sort with the State of Vermont. It was not until January of

1977, when the Atlantis stockholders' action commenced, that the appellant could be construed to have derived any "benefit of the laws" under *Hanson*. The appellant respectfully submits that this retroactive application of jurisdiction is in conflict with the Circuit Courts' findings in *Margoles* and *Curtis*. Further it conflicts with "reasonable predictability" requirement as stated by the other Circuits and this Court in *World-Wide Volkswagon*, *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, and *Burger King Corp v. Rudzewicz*.

The Vermont opinion portends great confusion if applied to stockholders in large corporations.

VI. THE SECOND CIRCUIT'S SANCTION OF SUBJECT MATTER JURISDICTION BY A STATE OVER A NON-RESIDENT'S ACTS IN THE DISTRICT OF COLUMBIA BASED ON THE GENERAL AND APPELLATE JURISDICTION OF THE STATE COURTS IS IN CONFLICT WITH OTHER STATES, CIRCUITS AND THIS COURT, AND REPRESENTS AN PRESSING UNSETTLED ISSUE.

Perhaps the most important and obvious issue related to subject matter jurisdiction is Article I, Section 8, Paragraph 17 of the Constitution of the United States which reads:

> "Congress shall have Power ... To exercise exclusive Legislation in all Cases whatsoever, over such District as may ... become the Seat of government of the United States."

It is often noted that the word "exclusive" in this clause is employed to eliminate any possibility that legislative power of Congress is to be concurrent with that of the ceding states.

In *Palmore v. United States*, 93 S.Ct. 1670 (1973), this Court restated its holding that:

> "Congress may exercised within the District [of Columbia] all

> legislative powers...and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the constitution of the United States"

In *Gertz v. Robert Welch, Inc.*, 94 S.Ct. 2997 (1974) at Page 3029, this Court taught that:

> "This Court in bygone years has repeatedly dealt with libel and slander actions from the District of Columbia and from the territories...in those areas where federal law controlled."

The acts and alleged injuries attributable to the appellant undisputably occurred in the District of Columbia where Federal Law controlled. The Courts have long held that speech on matters of public interest in the District of Columbia enjoys unique and rigorous protection. Not only does this recognize the importance of such speech but

also the unique jurisdiction of Washington, D.C.

The District Court argues that the Vermont Supreme Court had subject matter jurisdiction on the basis of the general jurisdiction of the Superior Court pursuant to 4 V.S.A. Sec 113. This is precisely the issue which has created substantial confusion among the highest Courts of the States and the Circuits - whether on appeal from a court which clearly lacks subject matter jurisdiction the defects are automatically rectified, that a judgement otherwise void becomes valid. It is a twist of logic which upsets the "reasonable forseeability" rule and sovereignty of other territorial jurisdictions. No single decision of this Court clearly addresses the issue.

For it is clear that one entering the District of Columbia should reasonably expect that the standards of *New York Times* to

prevail. It is clearly a violation of the reasonable foreseeability and substantial justice doctrine to permit a State Court to exercise subject matter jurisdiction over a non-resident and apply local State Law on a matter where exclusive jurisdiction has been granted to Congress. If every citizen engaged in discussion or news gathering with the press on matters of public interest would be subject to general jurisdiction of any State Court solely on the grounds of a stockholders' derivative action, the impact would be a chilling inhibition of free speech in the seat of government.

As stated in Jurisdiction and Forum Selection, Sec. 3:Ø1, Casad:

"A court can act officially only within the limits of its subject matter jurisdiction. Outside of those limits, its acts are regraded as though they had been done by "one not a court" (coram non judice)."

Count II requests relief in the form of damages for expenses and violation of civil rights. While it is well established that "judicial immunity" excepts the respondents from liability under Title 42 U.S.C.A. § 1983 for judicial acts unless there was a "want of all jurisdiction" and the acts of the respondents are judicial acts, the petitioner respectfully submits that the respondents clearly lacked both subject matter and general personal jurisdiction over petitioner, and at least one respondent had knowledge of the deficiencies and fraud upon the court and endeavored to avoid the issue. Thus there was a "want of all jurisdiction" and a knowing avoidance of the issue which the petitioner respectfully submits warrants relief.

V. THE DECISION BELOW ABRIDGES THE CONSTITUTIONAL RIGHT TO SPEAK TRUTHFULLY ON MATTERS OF PUBLIC INTEREST AND TO THE PRESS AND ADEQUATE RELIEF CANNOT BE HAD FROM ANY OTHER COURT.

At trial, Malloy did not dispute that petitioner's statement were true. Indeed, it is uncontested that petitioner was present during the discussion by Malloy and Green of the potato futures market while sailing in Sag Harbor. (Malloy Testimony Vol. III, Page 279, May 22, 1980.)

Clearly petitioner is not liable for slander if Morgan, the Washington Post reporter who called Malloy was "shaking the tree" as Malloy's testimony suggested. As stated in Libel and privacy, B. Sanford, at pp. 65, "Just as lawyers conduct "fishing expeditions" during discovery, reporters often "shake the tree to see what falls out" while investigating a possible story. Pretending to

know more than one actually does is a standard reportorial practice..."

Against these facts, the Vermont Supreme Court has created a new standard for slander on matters of public interest which is in conflict with the teaching of this Court in *New York Times v. Sullivan*, *Cervantes v. Time, Inc.* and *Philadelphia Newspapers, Inc. v. Hepps*. The Vermont Court asserts that petitioner "had insufficient evidence to call a newspaper reporter and imply or suggest that Malloy manipulated potato futures." It is clear that the trading of potato futures on the Exchange is a matter of public interest and commentary. Consequently, the teaching of *Philadelphia Newspapers* that "private-figure plaintiff cannot recover damages without also showing that the statements at issue are false ... To ensure that true speech on matters of public concern is not deterred, the common-law

presumption that defamatory speech is false cannot stand." The Vermont Court asserts that the restrictive common-law standard of private matters may be applied instead of the proper Constitutional standard taught by this Court and uses the presumption of "actual malice" because of the existence of an unrelated conflict between the parties to overcome the Constitutional barrier. But this overlooks the fact that most persons with unique knowledge of events or wrong-doing by public figures have a special relationship with those figures or events. This Court in *Rosenblatt v. Baer*, 86 S.Ct. 669, stated that definition of malice to include ill will, evil motive, intention to injure is constitutionally insufficient where discussion of public affairs is concerned. Even the dissenting opinion in *Philadelphia Newspapers* acknowledged that "That (First) Amendment does ... provide a constitutional

shield for truthful statements" and essentially only sought to protect private persons from defamation which could not be refuted. Malloy may be distinguished from private persons who "lack access to the channels of effective communication ... to counteract false statements" and public persons who have "thrust themselves to the forefront of particular public controversies ..." The opinion of the Vermont Court found that Malloy was quoted in the New York Times and the Wall Street Journal on matters of futures speculation. Clearly, Malloy had access to channels of communication and was public person in the domain of futures trading. The Vermont Court did not find any false statement of fact. Thus the Vermont opinion conflicts with holdings of both sides in *Philadelphia Newspapers*.

It would be a frightening regression of Constitutional Rights for this Court to sanction an abridgement permitting the test of "insufficient evidence" to govern slander liability when discussing matters of public interest in the District of Columbia.

VI. THERE IS A TOTAL ABSENCE OF EVIDENCE IN SUPPORT OF THE JUDGEMENT AND ADEQUATE RELIEF CANNOT BE HAD FROM ANY OTHER COURT.

The opinion of the Trial Court states that "as a result of petitioner's call to Morgan... there is credible evidence that brokers on the floor of the Exchange snickered and made snide remarks at Malloy." There is no evidence of any sort which indicates how a 5 minute telephone conversation in Washington, D.C. by an unknown 25 year-old with no contacts on the Exchange became known to "brokers on the floor of the Exchange" causing them to "snicker" at Malloy.

CONCLUSION

The Lobster Pot, a restaurant in Montpelier, Vermont is where many believe the Law of Vermont is formulated. On a visit after the decision in Atlantis came down, the petitioner heard from the next booth - that this case (Atlantis) will never be reviewed by the Supreme Court, they vacation here. After reading Justice Brennan's Meiklejohn Lecture, that conversation brought to mind the inclusion from Gilbert and Sullivan by Chief Justice Rehnquist in *Richmond Newspapers v. Virginia*:

"The Law is the true embodiment
of everything that's excellent,
It has no kind of fault of flaw,
And I, my Lords, embody the Law."

In some ways we can marvel at how far we have come, and also be reminded how short a

distance it is to where we began. In his 1st Inaugural Address, Thomas Jefferson said:

"Let them stand undisturbed as monuments of the safety with which error or opinion may be tolerated where reason is left free to combat it."

This present case raises substantial unsettled issues of State jurisdiction in an increasingly international business community and evidences a substantial injustices and dangers to speech and press where adequate relief may not be had from any other Court. For these reasons, the petitioner respectfully requests this Court to grant certiorari.

March 17, 1990

Respectfully submitted,

Dennis J. Solomon
P.O. Box 289
Yarmouthport, MA 02675
Tel. 508-394-1737

APPENDIX A

CASE NUMBER 89-7616

(Filed December 22, 1990)

U.S. COURT OF APPEALS

FOR THE SECOND CIRCUIT

Dennis J. Solomon, Plaintiff-Appellant

William C. Hill et al, Defendants-Appellees.

ORDER

* * *

The heart of appellant's legal argument is his claim that the Vermont Court lacked both personal and subject matter jurisdiction over the counterclaim for slander. He contends the actions that form the basis of the charge occurred in the District of Columbia a year prior to his bringing the derivative suit in Vermont and were therefore unrelated to the derivative suit, and further that neither he nor Malloy were Vermont residents at the time

of the alleged slander. He argues, accordingly, that the district court had jurisdiction to consider his request to vacate the Vermont Court's judgement as a collateral attack on the state court decision. Solomon also contends that judicial immunity should not bar suit because the courts never decided the jurisdiction issue.

We find these contentions unpersuasive and affirm substantially for the reasons stated by Judge Coffrin on his thorough opinion of the June 9, 1989.

The judgment of the district court is affirmed.

William Timbers

Richard Cardamone

George C. Pratt

APPENDIX B

CASE NUMBER VT 403-81

(Filed February 14, 1986)

SUPREME COURT OF VERMONT

Dennis J. Solomon, Plaintiff

Atlantis Development, Inc., et al., defendants

ENTRY ORDER AND FINDINGS

* * *

This is a derivative action brought by plaintiffs, Solomon . . . on their own behalf as shareholders ... (Atlantis).

* * *

In the instant case, plaintiff Solomon called an investigative reporter and told him of a conversation he overheard concerning the defendant's involvement in the potato futures market. His statement, taken in context, clearly implied that the defendant Malloy was illegally manipulating the market.

* * *

The lower court found that defendant Malloy suffered embarrassment and temporary injury to reputation. This finding is supported by credible evidence and the compensatory damage is therefore upheld. The court further found that the plaintiff acted with malice, a finding which is amply supported on the record. Thus, the court's punitive damage award must also stand.

* * *

APPENDIX C

CASE NUMBER VT S23-77Wnc

(Filed March 23, 1981)

SUPERIOR COURT OF VERMONT

WASHINGTON COUNTY

Dennis J. Solomon, Plaintiff

Atlantis Development, Inc., et al., defendants

FINDINGS OF FACT AND CONCLUSION OF LAW

222. Solomon read the Washington Post article in May of 1976. After reading the article, Solomon called Daniel Morgan, head of the national desk for the Washington Post. Solomon suggested or implied to Morgan that Malloy had been participating in a manipulation of the potato market.

223. Solomon knew that Malloy traded in potato futures. While sailing in May 1975, during the discussions concerning Malloy's

investment in Atlantis, Solomon had participated in a conversation with Malloy and a Stephen Greene about the potato futures market...

224. Defendant Patrick E. Malloy was known to the public through the news media as a significant trader in the commodity futures market, especially with respect to potato futures. Malloy traded in potato futures through Stephen Sundheimer and Pressner Trading Corporation at the time of the default.

225. Stephen Sundheimer was an individual who the Commodity Futures Trading Commission also investigated with respect to the default in the potato futures market.

231. Solomon never called Malloy or Greene to seek clarification of the May 1975 conversation he had overheard.

232. For at least a week or so, brokers who worked on the floor of two different commodity exchanges came up to Malloy and either questioned him about the Simplot default or made kidding remarks about it.

231. There were some floor brokers who made snide remarks to Malloy about rumors that they had heard about his alleged involvement with the Simplot default.

236. The telephone call form Morgan to Malloy and the questions and comments form other brokers caused Malloy some personal outrage and embarrassment for a period of time.

237. There is no evidence that Malloy suffered any financial damages as a result of the actions of Dennis Solomon.

* * *

Conclusions of Law

* * *

13. Solomon, in making his unfounded telephone call to Morgan of the Washington Post, slandered Malloy in attempting to implicate him in the potato futures scandal. The conversation which Solomon overheard between Malloy and Greene more than one year before was insufficient basis on which to form an opinion about illegal trading on the part of Malloy in the potato futures and insufficient reason to call an investigative

reporter. Had he been interested in learning the truth, Solomon could have called Greene or Malloy. The Court can only conclude that, by calling Morgan, Solomon meant to embarrass and harass Malloy and that his motive was malicious. Malloy did suffer embarrassment and temporary injury to his reputation. He claims no monetary loss, but seeks and is entitled to compensatory and punitive damages for embarrassment, personal outrage and temporary injury to his reputation ... Defendant Malloy shall be awarded judgment on his counterclaim against Solomon in the amount of $2,500 compensatory damages and $2,500 punitive damages.

* * *

Judge Gibson

APPENDIX D

CASE NUMBER 88-231

(Filed June 9, 1989)

U.S. DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Dennis J. Solomon, Plaintiff

William C. Hill et al, defendants.

OPINION AND ORDER

Plaintiff brought suit in this court seeking to have the decision of the Vermont Supreme Court on his appeal in another matter voided for lack of personal and subject matter jurisdiction, and to have damages awarded to him against the Justices of the Vermont Supreme Court. Defendants moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that plaintiff's complaint fails to state a claim upon which relief can be granted. For the

reasons stated below, defendants motion is GRANTED and plaintiff's claim is dismissed.

* * *

III. First Amendment Claim

Although plaintiffs complaint is not clear on the first amendment issue, either with regard to violation or relief sought, . . .

* * *

Judge Coffrin

APPENDIX E

CASE NUMBER 88-231

(Filed July 7, 1989)

U.S. DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Dennis J. Solomon, Plaintiff

William C. Hill et al, defendants.

ORDER

Plaintiff's "Motion for Relief under Rule 59(e) and Leave from Judgement to Dismiss to Amend the Complaint ... is denied.

* * *

Judge Coffrin